IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Appellants:	Thomas Lummis, et al.	§	
		§	Group Art Unit: 3781
Application No.:	10/758,459	§	
		§	Examiner: Mai, Tri M.
Filed:	January 15, 2004	§	
		§	Confirmation No.: 5873
For:	COVER FOR MODULES OF FIBROUS MATERIAL	§	

Mail Stop Appeal Brief Patents
Commissioner for Patents
PO Box 1450
Alexandria, VA 22313-1450

CERTIFICATE OF EFS-WEB FILING

Pursuant to 37 C.F.R. §1.8, I hereby certify that this correspondence is being electronically submitted to the U.S. Patent and Trademark Office website, www.uspto.gov, on April 20, 2009.

James Candelas

James Candelas

APPEAL BRIEF

Dear Sir:

This Appeal Brief is filed in support of the appeal in the above referenced application and is filed pursuant to the Notice of Appeal previously filed February 19, 2009. The 2-month period for submission of the appeal brief in this matters runs through April 19, 2009, which was a Sunday, and therefore this brief is timely filed on the next succeeding business day that is not a Saturday, Sunday, or Federal holiday. The Appellants authorize all required fees under 37 C.F.R. § 1.17 to be charged to Deposit Account No. 50-1515, of Conley Rose, P.C. of Texas.

Table of Contents

I. Real Party in Interest 3

II. Related Appeals and Interferences 3

III. Status of Claims 3

A. Total Number of Claims in the Application 3
B. Status of All Claims in the Application 3
C. Claims on Appeal 3

IV. Status of Amendments 3

V. Summary of the Claimed Subject Matter 4

VI. Grounds for Rejection to be Reviewed on Appeal 9

VII. Argument 10

A. §112 Definiteness Rejection 10
B. §103 Obviousness Rejection in view of *Porter* or *Porter* and *Frieder* 12
C. §103 Obviousness Rejection in view of *Porter* and *Horwath* or *Gallagher* 25
D. §103 Obviousness Rejection in view of *Porter* and *Campbell* or *Frieder* 27

VIII. Conclusion 29

IX. Claims Appendix 31

X. Evidence Appendix 37

XI. Related Proceedings Appendix 38

I. REAL PARTY IN INTEREST

The real party in interest in the present application is the following party: L&P Property Management Company.

II. RELATED APPEALS AND INTERFERENCES

None.

III. STATUS OF CLAIMS

A. Total Number of Claims in the Application

Claims in the application: 1-16.

B. Status of All Claims in the Application

1. Claims canceled: None.

2. Claims withdrawn from consideration but not canceled: 16.

3. Claims pending: 1-15.

4. Claims allowed: None.

5. Claims rejected: 1-15.

6. Claims neither rejected nor allowed: None.

C. Claims on Appeal

Claims on appeal: 1-15.

IV. STATUS OF AMENDMENTS

There are no outstanding amendments.

V. SUMMARY OF THE CLAIMED SUBJECT MATTER

This section provides a concise explanation of the subject matter defined in each of the independent claims involved in the appeal, referring to the specification by paragraph and line number.[1] Each element of the claims is identified with a corresponding reference to the specification where applicable. The citation to passages in the specification for each claim element fails to imply that the limitations from the specification should be read into the corresponding claim element.

A. Claim 1

The subject matter of claim 1 is directed to a cover for a module of fibrous material (see, e.g. Application at p. 2, ll 18-19), consisting of:

a top member (see, e.g. Application at p. 2, ll 19 and Fig.1, no. 24);

a first side wall member defining a first gap approximately at a midpoint of the first side wall member (see, e.g. Application at p. 2, ll 19-20 and Fig. 1, nos. 26 and 40);

a second side wall member defining a second gap approximately at a midpoint of the second side wall member (see, e.g. Application at p. 2, ll 20-22 and Fig. 2, nos. 28 and 46);

first and second end wall members (see, e.g. Application at p. 2, ll 22 and Fig. 1, no. 30 and Fig. 2, no. 32);

a channel extending around the cover lengthwise along a bottom edge of the first end wall member, a bottom edge of the first side wall member, a bottom edge of the second end wall member, and a bottom edge of the second side wall member, said channel being interrupted by

said first gap and said second gap (see, e.g. Application at p. 2, ll 22-24 and Figs. 1 and 2, no. 48);

a first support strap at an approximately midpoint of the first side wall member at a spaced distance beneath the top member and within the first gap (see, e.g. Application at p. 2, ll 24-26 and Fig. 1, no. 52));

a second support strap at an approximately midpoint of the second side wall member at a spaced distance beneath the top member and within the second gap (see, e.g. Application at p. 2, ll 26-27 and Fig. 2, no. 54);

a securing strap having first and second ends and running through the channel, said securing strap supported by the first and second support straps as it passes through the first and second gaps, wherein each of the first and second support straps provide no more than one point of contact between the securing strap and the first and second support straps on respective sides of the module, thereby optimizing relocation of forces on the cover to enhance the cover's ability to withstand peak wind conditions (see, e.g. Application at p. 3, ll 1-3; p. 6, ll. 22-25; and Figs. 1 and 2, no. 50); and

a fastening mechanism securing the first and second ends of the securing strap (see, e.g. Application at p. 7, ll. 17-18 and Fig.1, 78).

B. Claim 7

The subject matter of claim 7 is directed to a cover for a module of fibrous material, consisting of:

a top member (see, e.g. Application at p. 2, ll 19 and Fig. 1, no. 24);

---

[1] 37 C.F.R. § 41.37 (c)(1)(v) provides that the "[s]ummary of claimed subject matter ... shall refer to the specification by page and line number." Thus, the citations to the specification will be presented in the following

a first side wall member defining a first gap approximately at a midpoint of the first side wall member (see, e.g. Application at p. 2, ll 19-20 and Fig. 1, nos. 26 and 40);

a second side wall member defining a second gap approximately at a midpoint of the second side wall member (see, e.g. Application at p. 2, ll 21-22 and Fig. 2, nos. 28 and 46);

first and second end wall members (see, e.g. Application at p. 2, ll 22 and Fig. 1, no. 30 and Fig. 2, no. 32);

a channel extending around the cover along a bottom edge of the first end wall member, a bottom edge of the first side wall member, a bottom edge of the second end wall member, and a bottom edge of the second side wall member, said channel being interrupted by said first gap and said second gap (see, e.g. Application at p. 2, ll 22-24 and Figs. 1 and 2, no. 48),

a first support strap at an approximately midpoint of the first side wall member at a spaced distance beneath the top member and within the first gap, said first support strap formed by a piece of elongated fabric folded to form a first diamond-shaped loop and secured to the cover and a first ring secured within the loop (see, e.g. Application at p. 6, ll 7-20 and Fig. 1, nos. 52 and 56);

a second support strap at an approximately midpoint of the second side wall member at a spaced distance beneath the top member and within the second gap, said first and second support straps each comprise a piece of elongated fabric folded to form a second diamond-shaped loop and secured to the cover and a second ring secured within the loop (see, e.g. Application at p. 6, ll 7-20 and Fig.2, nos. 54 and 58);

a securing strap having first and second ends and running through the channel, said

---

form: Application at p. ____ (page number), ll. ____ (lines on the corresponding page).

securing strap supported by the first and second rings as it passes through the first and second gaps, wherein each of the first and second support straps provide no more than one point of contact between the securing strap and the first and second support straps on respective sides of the module, thereby optimizing relocation of forces on the cover to enhance the cover's ability to withstand peak wind conditions (see, e.g. Application at p. 3, ll 1-3 and Figs. 1 and 2, no. 50); and

a fastening mechanism securing the first and second ends of the securing strap (see, e.g. Application at p. 7, ll 17-18 and Fig. 1, no. 78).

C. Claim 8

The subject matter of claim 8 is directed to a method of securing a cover to a module of fibrous material having a top, first and second sides and first and second end, comprising the steps of:

placing a cover over the module with said cover encompassing the top of the module and at least a portion of the first and second sides and first and second ends (see, e.g. Application at p. 7, ll 10-16);

threading a securing strap through a channel in the cover and through first and second support straps on the cover located at the approximately midpoint of the first and second sides of the module, wherein each of said first and second support straps provide no more than one point of contact between the securing strap and the first and second support straps on respective sides of the module, thereby optimizing relocation of forces on the cover to enhance the cover's ability to withstand peak wind conditions (see, e.g. Application at p. 6, ll 19-27; p. 7, ll 12-13); and

tightening the securing strap about the module (see, e.g. Application at p. 6, ll 25-26; p. 7, ll 16-17).

D. Claim 9

The subject matter of claim 9 is directed to a cover for a module of fibrous material, consisting of:

a top member (see, e.g. Application at p. 2, ll 19 and Fig. 1, no. 24);

a first side wall member (see, e.g. Application at p. 2, ll 19 and Fig. 1, no. 26);

a second side wall member (see, e.g. Application at p. 2, ll 21 and Fig. 2, no. 28);

first and second end wall members (see, e.g. Application at p. 2, ll 22 and Fig. 1, no. 30 and Fig. 2, no. 32);

a channel extending around the cover along a bottom edge of the first end wall member, a bottom edge of the first side wall member, a bottom edge of the second end wall member, and a bottom edge of the second side wall member (see, e.g. Application at p. 2, ll 22-24 and Figs. 1 and 2, no. 48);

a first support strap at an approximately midpoint of the first side wall member (see, e.g. Application at p. 6, ll 6-7 and Fig. 1, no. 52);

a second support strap at an approximately midpoint of the second side wall member (see, e.g. Application at p. 6, ll 6-7 and Fig. 2, no. 54);

a securing strap having first and second ends and running through the channel, said securing strap supported by the first and second support straps, where the first and second support straps provide no more than one point of contact between the securing strap and each of the first and second support straps on their respectively sides of the module, thereby optimizing relocation of forces on the cover to enhance the cover's ability to withstand peak wind conditions (see, e.g. Application at p. 3, ll 1-3 and Figs. 1 and 2, no. 50).

VI. GROUNDS FOR REJECTION TO BE REVIEWED ON APPEAL

1. Whether claims 1-15 are indefinite under 35 U.S.C. §112, second paragraph.

2. Whether claim 8 is obvious under 35 U.S.C. §103(a) over *Porter* (U.S. Patent 5,904,243), or alternatively, over *Porter* in view of *Frieder* (U.S. Patent 3,011,820).

3. Whether claims 1-3, 5, 6, 9-11, and 13-15 are obvious under §103(a) over *Porter* in view of either *Horwath* (U.S. Published Application 2003/0226846) or *Gallagher* (U.S. Patent 4,308,905).

4. Whether claims 4, 7, and 12 are obvious under 103(a) over *Porter* in view of either *Campbell* (U.S. Patent 2,705,461) or *Frieder*.

VII. ARGUMENT

A. §112 Definiteness Rejection

Claims 1-15 have been rejected under 35 USC §112, with the Final Office Action of December 17, 2008 stating that the claims are "indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention." For such a §112 analysis, the fundamental factual inquiry is "whether the scope of the claim is clear to a hypothetical person possessing the ordinary level of skill in the pertinent art." *See MPEP 2171 and Metabolite Lab. , Inc. v. Laboratory Corp*, 370 F.3d 1354, 1366 (Fed. Cir. 2004). The examiner has not specifically identified how the claims are unclear (only indicating that "Applicant's assertion that having only one support as compared to having multiple support location would enhance the cover's ability to withstand peak wind condition contradicts physic laws"). Applicants contend that the scope of the claims is clear and fully supported, and that a person skilled in the art field certainly would understand the claims in light of the description set forth in the Specification text. Indeed, the examiner seems to clearly understand what the Applicants are claiming (indicating in paragraph no. 2 of the Final Office Action of December 17, 2008, for example, that Applicants' invention differs primarily from the cited *Porter* reference by requiring "no more than one point of contact between the securing strap and support straps" per side), even if he does not believe that this difference provides a more secure attachment. Thus, Applicants suggest that the §112 rejection is improper and should be withdrawn.

It seems that the examiner's real concern here is not whether the claims are indefinite; rather the examiner simply does not believe "Applicant's assertion that having only one support

[per side of the module] as compared having multiple support locations would enhance the cover's ability to withstand peak wind conditions" (indicating that it "contradicts physic laws"). This is **not** a proper reason for a §112 rejection, however, since the claim limitation of using only one support strap on each side of the module (based on the claims to a cover "*consisting of* . . . a first support strap . . . [and] a second support strap . . ., wherein each of the first and second support straps provide no more than one point of contact . . . on respective sides of the module") is clearly supported by the Specification (see for example Specification p. 6, lines 22-27; p. 7, lines 2-5; Figs. 1-2; and the Summary of Claimed Subject Matter above), and the scope of the claims would certainly be understood by those skilled in the art in light of the Specification. Since the examiner has not raised any valid ground for a §112 indefiniteness rejection, Applicants respectfully request withdrawal of this improper §112 rejection.

Even though not relevant to a proper §112 rejection, for the sake of completeness Applicants also note that the evidence does indeed indicate that Applicants' assertion, while surprising, is in fact true. Specifically, the Taubert declaration (attached hereto as evidence and initially submitted with the Response to Office Action of June 13, 2008) describes side-by-side field tests of about 1,000 *Porter* covers (having multiple support straps per side) and about 1,700 of the presently claimed (single support strap per side) covers for over three years (*see Taubert declaration, paragraphs 6-12*), and notes that these field tests demonstrate that the presently claimed (single support strap per side) "covers are surprisingly superior at staying in place on the cotton module." *See Taubert Declaration, paragraph 13.* More specifically, Mr. Taubert notes that while about 40% of the *Porter* covers were lost during the side-by-side field testing, none of the presently claimed covers were lost. *See Taubert Declaration, paragraph 14.* So, the objective data reported in the Taubert declaration clearly demonstrates that the presently claimed

covers "perform significantly better in real-world conditions" than the *Porter* covers of the cited prior art. This point is explained in more detail below, and hereby incorporated fully herein. Clearly, the evidence supports patentability, so Applicants respectfully request that the §112 rejection be withdrawn.

B. §103 Obviousness Rejection in view of *Porter* or *Porter* and *Frieder*

Claim 8 has been rejected under 35 USC § 103(a) as being unpatentable over *Porter* (U.S. Patent No. 5,904,243) or in the alternative, under 35 USC § 103(a) as being unpatentable over *Porter* in view of *Frieder et al.* (U.S. Patent No. 3,011,820). Applicants respectfully disagree with this rejection for at least the reasons set forth below.

1. *Porter* does not obviously lead to the present invention

Under 35 USC §103, the central question when considering obviousness is whether a person of ordinary skill in the art field looking at these cited references at the time of invention would obviously be led to the present invention. *See Graham v. John Deere, 383 U.S. 1, 15 (1966) and MPEP 2142.* The present invention claims only one support strap per side (by use of a "consisting of" transitional phrase when describing the cover as having a first and a second support strap, and indicating specifically that the straps "provide no more than one point of contact . . . on respective sides of the module").[2] There is nothing in any of the cited references that would lead a person of skill in the art field to the counter-intuitive step of eliminating supports from the cited *Porter* reference in an attempt to strengthen wind resistance.

a. Background

The purpose of the present invention is to cover cotton modules left in the field after harvesting, to protect them from damage. "[C]otton modules [are] exposed to the elements for weeks at a time, resulting in significant damage" if not adequately protected. *Specification, page 1, lines 10-11.* The covers must ". . . protect them from wind and rain . . .," and must be secured "to the modules strongly enough to prevent the covers from being blown off." Additionally, the covers must be secured strongly enough so that wind uplift will not form gaps that would ". . . allow wind, rain, and moisture to penetrate the tarp and damage the module." *Specification, page 1, lines 11-16.* Prior art covers, such as the *Porter* cover cited by the examiner, incorporate multiple hanger mechanisms along each side of the cover in an effort to keep the wind from lifting the cover off its secure placement atop the cotton module. "While this arrangement is fairly effective during normal wind conditions, it has been found to be significantly less effective during peak wind conditions involving significant wind gusts." *Specification, page 1, lines 19-25.* Since a significant portion of the cotton belt in the United States is located in the Central Plains, which are prone to severe wind gusts, the prior art *Porter* covers have proven relatively ineffective in practice.

Porter itself actually notes the importance of the covers remaining securely in place, to ". . . protect the cotton module from the wind and rain." *Porter Col. 2, lines 3-4; and see Col. 2, lines 5-30 and Col. 4, lines 65-67.* To this end, *Porter* specifically teaches a cover with multiple support straps per side (*see Porter*, Col. 12, lines 42-54 reciting multiple hanger members on each side of the cover, as shown in Figs. 16 and 19). If anything, the importance of a secure

[2] Applicants note that use of the "consisting of" transitional phrase excludes any element not specified in the claim. *See MPEP 2111.03*, citing *In re Gray*, 53 F.2d 520.

attachment of the cover to the module would suggest the use of more, not less, support straps. *See Daniel Declaration, paragraphs 5-6 and Taubert Declaration, paragraph 19.* There is simply nothing in *Porter* that would lead a person of skill in the art field towards the presently claimed invention (having only a single support strap on each side) in an effort to improve secure attachment in place on a cotton module.

b. Evidence of non-obviousness

The non-obviousness of the present invention is supported by the evidence set forth in the Taubert declaration and the Daniel declaration (attached hereto and previously submitted as evidence in the Responses of June 13, 2008 and December 13, 2007). As the Supreme Court has noted in its recent *KSR* decision, "the Graham factors, including secondary considerations when present, are the controlling inquiries in any obviousness analysis." *See MPEP 2141II.* "Objective evidence relevant to the issue of obviousness must be evaluated by Office personnel," and "[s]uch evidence, sometimes referred to as 'secondary considerations,' may include evidence of commercial success, long-felt but unsolved needs, failure of others, and unexpected results." *MPEP 2141, referring to Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966). Thus, the evidence of non-obviousness submitted in the Taubert and Daniel declarations must be considered in support of the pending application.

The Taubert declaration presents third-party evidence of long-felt but unsolved need for a module cover that can better resist strong wind gusts, unexpected results (that a single support strap per side would prove stronger that the *Porter* cover), and commercial success. First, Mr. Taubert provides context for his testimony evidence, explaining that "he has 19 years of experience relating to cotton modules" (Taubert, paragraph 1), that he has extensive education and work experience in this industry (Taubert, paragraphs 2-4), and that he is intimately familiar

with both the present invention and the *Porter* cover, having used both covers for several years as part of his current employment (Taubert, paragraphs 5-7).[3] Thus, Mr. Taubert is an experienced, independent third party who is imminently qualified to compare these two products. *See Taubert, paragraph 11.*

Evidence of Long-felt Need:

With regard to the long-felt but unsolved need for a cover better than that provided by *Porter*, Mr. Taubert notes in paragraph 8 that prior to the introduction of the present invention, he "had been using [the *Porter*] covers for several years, but had long sought a better cover solution for cotton modules since [the *Porter*] covers had a tendency to come off in high wind conditions." More specifically, he notes that "during the harvest season of 2004 and 2005 we experienced several unusually high wind events in west Texas," and that "approximately 40% of [the Porter] covers were lost and never recovered." *See Taubert, paragraph 14.* Frustrated, he tried the present invention, and "none of [the present invention] covers were lost." *See Taubert paragraph 14.* As a consequence, Mr. Taubert has "stopped buying or using [the Porter] covers, and now exclusively uses [the present invention]." *Taubert, paragraph 16.* Thus, the Taubert declaration demonstrates that there was a long-felt need in the industry for an improved module cover, and that the present invention has met that need.

This evidence of long-felt but unmet need is supplemented by the Daniel declaration. Mr. Daniel is educated and experienced in this field, with 25 years of related work experience. *Daniel, paragraphs 2-3.* Over the course of his career, Mr. Daniel has noted "that there has

[3] The Taubert declaration also notes that the commercial product of the present invention used by Mr. Taubert is as set forth and claimed in the pending application, and that the commercial version of the *Porter* cover is as set forth in Figs. 16 and 19 of the cited *Porter* reference. *See Taubert, paragraphs 5 and 7.* Thus, this comparison is directly applicable to the non-obviousness of the present invention over the cited *Porter* reference.

existed a long-felt and unresolved need in the market for module covers capable of withstanding strong gusts of wind, . . . [and that] other people have tried without success to design module covers to provide greater resistance to peak wind conditions." *Daniel, paragraph 4.* The present invention, however, performed better in side-by-side comparisons to the *Porter* covers at withstanding significantly higher peak wind conditions. *See Daniel, paragraph 5.* So the testimony evidence further supports the non-obviousness of the present invention based on long-felt but unmet need in the industry.

Evidence of Unexpected Results:

The Taubert declaration also provides independent third-party evidence that the present invention is unexpectedly superior to the prior art *Porter* cover. As mentioned above, Mr. Taubert grew frustrated with the failure of the *Porter* covers, and so turned to the present invention as an alternative (even though he was extremely skeptical that the present one-strap-per-side invention could provide improvement, as discussed in paragraph 19 of the Taubert declaration). He used "approximately 1,000 [*Porter*] covers over 3+ years, and . . . approximately 1,700 [of the present invention] covers over 4 years," and his experience using both types of covers "in similar conditions over several years [revealed that the present] covers are surprisingly superior at staying in place on the cotton modules, and the level of superiority is so significant that it has caused [him] to stop using the [*Porter*] covers in favor of" the present invention. *See Taubert, paragraphs 12-13.* Mr. Taubert then goes on to give specific details, noting that in extensive side-by-side field testing under similar conditions, "approximately 40% of [the *Porter*] covers were lost and never recovered," having been blown off the cotton modules on which they were placed. "None of the [present invention] covers were lost," however, "and none have been lost since." *See Taubert, paragraphs 14-15.*

Thus, the present invention having only one support strap per side proved markedly superior at staying secured atop cotton modules. This result was quite unexpected, even to one as experienced in the field as Mr. Taubert, and he was "initially surprised to find that [the present invention] covers provide superior performance, since [he] would have expected the additional straps of the [*Porter*] cover to provide added strength." Nevertheless, Mr. Taubert became convinced and "won over by the real-world results seen in the field." *Taubert, paragraph 19.* Mr. Taubert spoke "informally with others in [the] industry, and their experiences with these products are similar to [his] own." *See Taubert, paragraph 18.* And the fact that the only significant difference between the present invention and the *Porter* cover is that *Porter* "uses multiple support straps offset from the center to hold the cover in place on cotton modules" demonstrates that the claimed difference is the cause of the significant improvement provided by the present invention. *See Taubert, paragraphs 9-10.* So, the superiority of using one strap per side, rather than the prior art teaching of multiple support straps per side, was truly an unexpected result demonstrating non-obviousness. *See Taubert, paragraphs 7, 13, 15, and 17-20.*

This evidence of unexpected results is supplemented by the Daniel declaration. Mr. Daniel testifies that in side-by-side comparisons with the *Porter* cover, the present invention was "able to withstand significantly higher peak wind conditions." *See Daniel, paragraph 5.* This improvement was both unexpected and significant in Mr. Daniel's experience, and ran counter to the skepticism of experts in the field (who had thought, quite reasonably, that multiple support straps per side would result in a stronger attachment). *See Daniel, paragraphs 5-6.* So the testimony evidence further supports the non-obviousness of the present invention based on unexpected results.

Evidence of Commercial Success:

The Taubert declaration also provides independent third-party evidence of commercial success of the present invention. In his work for Oasis Gin, Inc., Mr. Taubert purchases and uses a large number of module covers. For example, over a three year period, he purchased and used approximately 1,000 *Porter* covers, and over a four year period he purchased and used approximately 1,700 of the presently claimed covers. *See Taubert, paragraphs 6 and 12.* As noted above, Mr. Taubert has explained that he had a long-felt need for a better module cover that could stay in place despite high wind gust conditions, and that the presently claimed invention performed remarkably better that the prior art module cover. Because of the superior performance of the present invention covers, he has "stopped buying or using [*Porter*] covers, and now exclusively uses" the presently claimed invention covers. *See Taubert, paragraphs 7, 13, and 16.* "The superior results of [the present one-strap-per-side invention] covers are primarily why [he] uses [the present invention] covers instead of [the *Porter*] covers, so the performance difference has led to commercial success of the [present invention] cover." *See Taubert, paragraph 21.*

The Daniel declaration further describes the commercial success arising out of the unexpected superiority of the present invention over the prior art *Porter* module cover. Mr. Daniel works for the assignee of the present invention, so he is well positioned to note the commercial success of the present invention. *Daniel, paragraph 3.* As Mr. Daniel notes, "the claimed invention reads on the commercial embodiment of the claimed invention. There has been significant commercial success of the commercial embodiment of the claimed invention. In fact, the commercial embodiment of the claimed invention now represents more than 33% of company sales . . ., [and] based upon [his] experience, this commercial success is a direct result

of its greater resistance to being displaced by strong gusts." *See Daniel, paragraph 7.* So the testimony evidence further supports the non-obviousness of the present invention based on commercial success.

So considering the *Graham* factor evidence described above (showing long-felt but unmet need, unexpected results, and commercial success), non-obviousness seems clear. The 40% improvement described in paragraph 14 of the Taubert declaration is clearly both significant and surprisingly unexpected. In fact, the results were so significant that Mr. Taubert stopped using *Porter* covers and switched exclusively to the present invention (with a single strap). *See Taubert declaration, paragraphs 13, 15, and 16.* And Mr. Taubert, a representative person of skill in the art field, was surprised by the superior performance of the present invention, as described in paragraphs 1-4 and 19-20 of the Taubert declaration, since he subscribed to the common belief of experts in the field that multiple support straps per side would provide a more secure attachment than a single support strap per side.

Furthermore, the Taubert declaration provides ample nexus by linking the superior results of the presently claimed invention to the single support strap (noting in paragraph 10, for example, that the *Porter* cover is essentially the same as the presently claimed invention, except that *Porter* uses multiple support straps; this can also be seen directly by comparing Figs. 16 and 19 of *Porter* to the drawings of the present invention). Further, Mr. Taubert notes in paragraph 15 that the side-by-side tests occurred under similar conditions in the field. Mr. Taubert was an independent third party customer of both products, and was motivated by his own business interests to use each cover properly to give each cover the best chance of success (so that his cash crop would not be damaged if a cover blew off and exposed the cotton modules to the

elements). Further, the large sample size of the comparison tests (using over 1,000 *Porter* covers and 1,700 of the present invention covers) lends weight to his results (reducing any concerns about minor variances in the specific conditions experienced by individual covers in the field to negligible levels, especially since Mr. Taubert has testified that they were used under similar conditions during overlapping time periods). The superior performance of the present invention was no fluke, but was seen cumulatively over many repeated runs. The Daniel declaration provides further support to these points, strengthening the showing of non-obviousness.

c. The Examiner's own disbelief supports non-obviousness

Indeed, the examiner's own statement with regard to the §112 rejection in the office action of August 8, 2008 further demonstrates that Applicants' single-strap invention is counter-intuitive, and thus non-obvious. It seems strange that the examiner would with one breath say that the claimed superiority of the present invention (with one support strap per side) contradicts the laws of physics, and then in the very next breath say that such a one-strap-per-side invention would be obvious. The surprising finding that the present invention's use of a single support strap per side is superior to *Porter*'s multiple strap cover runs counter to intuition. Prior to the present invention, a person of ordinary skill in the art field simply would not be led towards the presently claimed invention. Rather, the examiner's own extreme reaction demonstrates that persons of skill would react with disbelief to the very idea that a cover with fewer straps would better resist wind uplift forces, thus reinforcing the evidence of unexpected results discussed above. **This is the very essence of non-obviousness.**

d. The Examiner's stated reasons for modification do not withstand scrutiny

At the time of the invention, it seemed contrary to the stated purpose of a cover to reduce the number of support straps holding the cover securely in place atop a cotton module. After all, the function of the straps is to provide a secure attachment of the cover in place atop a module, and the wisdom in the industry at the time of invention would expect a reduction in the number of support straps to weaken the cover's attachment atop the cotton module. This point is highlighted not only by Mr. Taubert's admission of surprise (in paragraph 19), but also by the examiner's very own statement of disbelief (indicating that this concept violates the laws of physics). And the examiner's attempts to demonstrate obviousness in paragraph no. 5 of the Final Office Action of December 17, 2008 based on the conclusory statement of "providing the desired number of support and/or to save material" is nothing more than a red herring, intended to distract from the real issue. The critical issue in question is improving the strength by which the cover is held in place atop a cotton module, and the damage to the cash crop caused by cover failures would dwarf the infinitesimal savings that might be offered by eliminating straps to save material; no rational person would eliminate support straps while believing that this would weaken the grip of the cover atop the module. The examiner has not provided any legitimate reason for the proposed modification, and certainly has not overcome the strong evidence of non-obviousness presented in the declarations.

e. Considering the evidence, non-obviousness is apparent

Perhaps the real problem here is a misunderstanding by the examiner about whether the declaration evidence must be given weight when considering obviousness. On page 5 of the Office Action of August 8, 2008, the examiner indicated that the Taubert declaration will not be

given any weight, stating that "expert's testimony can not take the place of evidence, and there is no evidence in this case showing the device with only one point of contact would perform better than the device as applied by Porter," and the examiner reaffirms this mistaken belief in paragraph 5 of the Final Office Acton of December 17, 2008. This is simply wrong – **these declarations are evidence, and the examiner cannot ignore this highly relevant declaration evidence**, but must consider its support of non-obviousness.

The PTO's own rules quite clearly indicate that evidence cannot be disregarded, and that all evidence must be considered and weighed. For example, MPEP 716.01 requires that "evidence traversing rejections, when timely presented, must be considered by the examiner whenever present," while noting that this applies to "all evidence traversing rejections submitted by applicants, including affidavits or declarations." Thus the Taubert declaration, with its third-party eyewitness testimony regarding the results of side-by-side field tests (as described above and hereby fully incorporated), clearly is evidence that must be considered. *See also MPEP 716.01(a)* (stating that "affidavits or declarations, when timely presented, containing evidence . . . must be considered by the examiner in determining the issue of obviousness of claims for patentability under 35 USC 103," and see *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966)). In fact, even opinion testimony in a declaration must be given weight. *See MPEP 716.01(c)III* ("although factual evidence is preferable to opinion testimony, such testimony is entitled to consideration and some weight"). Of course, the Taubert declaration reports first-hand eyewitness evidence of the results of over 1,000 side-by-side field tests, so it clearly is much more substantial than mere opinion testimony. Thus, there is absolutely no permissible reason for the examiner to disregard the evidence in the attached declarations.

Further, "when an applicant timely submits evidence traversing a rejection, the examiner must reconsider the patentability of the claimed invention," with the "ultimate determination of patentability [being] based on consideration of the entire record, by a preponderance of evidence." *MPEP 716.01(d), and see In re Oetiker*, 977 F.2d 1443, 1445 (Fed. Cir. 1992). Thus, the evidence of non-obviousness submitted by the Applicants in the declarations must be weighed against any countervailing evidence of obviousness presented by the examiner. Such a weighing of evidence in this case clearly indicates that the invention is non-obvious. After all, the only evidence comparing the effectiveness of the present invention's single support strap to the *Porter* multi-strap cover are the declarations submitted by Applicants, which indicate that in side-by-side field tests, the present invention showed a surprising 40% improvement over the *Porter* cover. *See Taubert Declaration, paragraph 14.*

The declarations have not been refuted or contradicted by any countervailing evidence. Instead, the examiner seems to have relied on a single conclusory statement that ". . . it is unlikely that support having at only one place would be superior to support at two locations as shown by Porter without contradicting the laws of physics." Of course, the examiner has not produced any actual analysis of how the laws of physics allegedly would demonstrate that the present invention could not be superior at resisting peak wind conditions, but seems instead to be relying solely on his gut feeling. Such reliance on conclusory statements is legally improper, however, as noted by the U.S. Supreme Court in *KSR International Co. v. Teleflex Inc.*, 550 U.S. 398, 127 S.Ct. 1727 (No. 04-1350, 2007) indicating that "rejections on obviousness grounds cannot be sustained by mere conclusory statements." Since the declarations submitted by Applicants are the **only** evidence on this matter, an impartial weighing of evidence clearly points

to non-obviousness. Accordingly, Applicants respectfully request that this rejection be withdrawn.

2. Combination of *Porter* with *Frieder* would not obviously lead towards the proposed modification

As explained in detail above and hereby incorporated fully herein, the present invention is non-obvious in light of the *Porter* reference (since *Porter* would not lead towards an improved cover with only one support strap per side). The declaration evidence clearly establishes non-obviousness. Applicants also note that the cited *Frieder* reference would not lead a person of ordinary skill in the art field to modify *Porter* towards the presently claimed cover with a single support strap on each side. The presently claimed invention is for a cover to protect cotton modules from rain while resisting wind up-lift forces so that the cover may stay securely in place atop the cotton module, and it uses the surprising fact that one strap per side provides a stronger grip in order to provide an improved cotton module cover. The cited *Frieder* reference does not even relate to this wind-uplift issue, and so would offer no guidance to a person of skill trying to improve the *Porter* cover at the time of invention.

More specifically, the *Frieder* reference deals with cargo netting. *See Frieder, Col. 1, lines 1-12, for example.* Cargo netting uses an open-mesh material (*see Frieder*, Fig. 1 for example) that would not experience the wind uplift forces that Applicants' presently claimed invention is attempting to address, since cargo netting does not have the type of surface area that would catch the wind. Additionally, the cargo netting of *Frieder* is not used in situations where wind uplift forces could possibly come into play – the netting of *Frieder* does not provide protection from the elements in an exposed, windy environment, but instead is used to lift objects using a crane, for example (as shown in Fig. 18). Thus, *Frieder* would not provide any insight

into addressing this wind up-lift problem. Also, cargo netting cannot serve as a rain cover, since its open mesh would not offer any protection from water penetration.

Quite frankly, cargo netting is irrelevant to the issues of the presently claimed invention, so it certainly would not suggest to persons skilled in the art field at the time of the invention that the *Porter* module cover might be improved by reducing the number of support straps per side. As a final aside, Applicants note for the record that the *Frieder* reference does not even show the use of a single support strap per side (with cited figure 1, for example, seeming to show multiple attachment anchors per side, with two 42 and one 48 elements per side). Thus, these references cannot render the claims obvious, and Applicants respectfully request that this rejection be withdrawn.

C. §103 Obviousness Rejection in view of *Porter* and *Horwath* or *Gallagher*

Claims 1-3, 5, 6, 9-11, 13 and 14 have been rejected under 35 USC § 103(a) as being unpatentable over the *Porter* rejection, and further in view of either *Horwath* (US Published Application No. 2003/0226846) or *Gallagher* (U.S. Patent No. 4,308,905). As explained in detail above and hereby incorporated fully herein, the present invention is non-obvious in light of the *Porter* reference (since *Porter* would not lead towards an improved cover with only one support strap per side). The declaration evidence clearly establishes non-obviousness. Applicants also note that the cited *Horwath* and *Gallagher* references would not lead a person of ordinary skill in the art field to modify *Porter* towards the presently claimed cover with a single support strap on each side. In fact, the examiner has not even explained how these additional references could be relevant, only making general reference to them in the opening sentence of the rejection, and then never explaining what teaching they might provide for modification of *Porter*.

Similar to the *Frieder* reference discussed above, the *Horwath* reference relates to a mesh netting cover, used for covering garbage or recycling receptacles. *See Horwath Abstract for example.* For these reasons, the arguments above regarding *Frieder*'s cargo netting are incorporated by reference herein. The *Horwath* cover uses an open-mesh material (*see Horwath*, Fig. 1 for example) that would not experience the wind uplift forces that Applicants' presently claimed invention is attempting to address (since open mesh does not have the type of surface area that would catch the wind), and would not offer protection from rain (which is unnecessary since the mesh covers garbage). In fact, *Horwath* seems to use the mesh material exactly for this reason, since these covers are designed to hold garbage in receptacles and the mesh will not experience wind forces that might remove the cover from the receptacle and allow the waste items to be blown out. *See Horwath, paragraphs 0004-0005*. Thus, *Horwath* would not provide any insight into addressing the wind up-lift problem at issue in the present invention. This type of mesh cover is irrelevant to the issues of the presently claimed invention, so it certainly would not suggest to persons skilled in the art field at the time of the invention that the *Porter* module cover might be improved by reducing the number of support straps per side.

Likewise, *Gallagher* would not lead a person of skill to modify *Porter* towards the presently claimed invention. The *Gallagher* reference relates to a side-mounted cover for a wall-mounted air conditioner window unit. Obviously, air conditioning has nothing to do with cotton modules; this reference seems to come completely out of left field. Additionally, the *Gallagher* cover is side-mounted, and does not cover the top of the A/C unit. Thus, it does not offer protection from rain (of the sort required by Applicants' module cover). And being side-mounted (and also being located next to a house that serves as a windbreak rather than being out in the open without protection from the wind), it does not experience wind gust up-lift forces of

the sort that the present cotton module cover must resist. It should also be noted that *Gallagher* does not demonstrate anything resembling support straps, and so it would not be instructive to persons of skill seeking to strengthen the support straps of the *Porter* cover. Certainly, *Gallagher* would not suggest to persons skilled in the art field at the time of the invention that the *Porter* module cover might be improved by reducing the number of support straps per side.

Finally, neither *Horwath* nor *Gallagher* uses support straps at all. Rather, they each seem to teach attachment by tightening the cover about the entire bottom periphery (see *Horwath* Fig. 2 and *Gallagher* Fig. 1). Thus, these references could not lead a person of skill to modify the multiple-support-strap-per-side cover of *Porter* towards the present invention. Since the cited references do not render the claimed invention obvious, Applicants respectfully request that this rejection be withdrawn.

D. §103 Obviousness Rejection in view of *Porter* and *Campbell* or *Frieder*

Claims 4, 7, and 12 have been rejected under 35 USC § 103(a) as being unpatentable over the *Porter* rejection and further in view of either *Campbell* (U.S. Patent No. 2,705,461) or *Frieder et al.* As explained in detail above and hereby incorporated fully herein, the present invention is non-obvious in light of the *Porter* reference (since *Porter* would not lead towards an improved cover with only one support strap per side). The declaration evidence clearly establishes non-obviousness. Applicants also note that the cited *Campbell* and *Frieder* references would not lead a person of ordinary skill in the art field to modify *Porter* towards the presently claimed cover with a single support strap on each side.

The detailed discussion of the *Frieder* reference above is incorporated fully herein. It shows that *Frieder* would not lead towards a modification of *Porter* that would render the present single strap per side invention obvious. Additionally, Applicants note that *Frieder* does

not demonstrate the diamond shaped support straps of claims 4, 7, and 12. *Frieder* teaches an interlaced mesh netting. *See Col. 2, lines22-26.* As shown in Fig. 1, the mesh netting elements are woven in a criss-cross pattern, which is formed by the interaction of different linear elements within the netting. There is no teaching of having individual support straps folded into a diamond shape to improve strength.

Similarly, *Campbell* involves cargo netting (and so the detailed discussion of *Frieder* is incorporated herein as well) with multiple tie down locations per side (see Fig. 1), and so it would not lead towards a modification of *Porter* that would render the present single strap per side invention obvious. Additionally, Applicants note that *Campbell* does not teach folding individual support straps into a diamond shape to improve strength, but instead teaches connecting "alternate cables at alternate points" to form a grid pattern in the net. *Campbell, Col. 2, lines 53-55.*

So, the cited references do not lead to modification of *Porter* towards the present one-strap-per-side invention, and they do not reveal the folded diamond-shaped support straps of these claims. Since the cited references do not render the claimed invention obvious, Applicants respectfully request that this rejection be withdrawn.

VIII. CONCLUSION

There has been no demonstration of proper §112 grounds for rejection, since the examiner has not shown that the scope of the claims would be unclear to persons skilled in the art field. Furthermore, both the submitted evidence and the examiner's own reaction of incredulity demonstrate the non-obviousness of the presently claimed one-strap-per-side invention over the cited *Porter* reference. And the irrelevant secondary references would not lead persons of skill to modify *Porter* towards the present invention. It seems that the examiner's rejection is actually based on nothing more than a gut feeling, as summed up in the conclusory statement that the alleged superiority of the invention "contradicts physic laws." But an obviousness rejection cannot legally be sustained by such a conclusory statement. Rather, the evidence clearly demonstrates that the presently claimed invention is indeed more than an obvious improvement over the cited prior art.

It is believed that each ground of rejection raised in the Final Office Action dated December 17, 2008 has been fully addressed. In view of the above arguments, the Appellants respectfully request that the final rejection of the claims be reversed and the case advanced to issue. Should the Examiner feel that a telephone interview would advance prosecution of the present application, the Appellants invite the Examiner to call the attorneys of record.

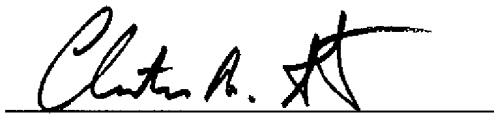
The Commissioner is hereby authorized to charge payment of any further fees associated with any of the foregoing papers submitted herewith, or to credit any overpayment thereof, to Deposit Account No. 50-1515, of Conley Rose, P.C. of Texas. It is believed that no extensions of time or fees are required, beyond those that may otherwise be provided for in documents accompanying this paper. However, in the event that additional extensions of time are necessary

to allow consideration of this paper, such extensions are hereby petitioned under 37 C.F.R. 1.136(a), and any fees required are hereby authorized to be charged to the Deposit Account set forth above. If petition for extension of time is necessary for this paper to be deemed timely filed, please consider this a petition therefore.

Respectfully submitted,

CONLEY ROSE, P.C.

Date: April 20, 2009



Clinton R. Stuart
Reg. No. 48,859

ATTORNEY FOR APPELLANTS

5601 Granite Parkway, Suite 750
Plano, Texas 75024
Telephone: (972) 731-2288
Facsimile: (972) 731-2289

IX. CLAIMS APPENDIX

The text of the claims involved in the appeal is:

1. A cover for a module of fibrous material, consisting of:

a top member;

a first side wall member defining a first gap approximately at a midpoint of the first side wall member;

a second side wall member defining a second gap approximately at a midpoint of the second side wall member;

first and second end wall members;

a channel extending around the cover lengthwise along a bottom edge of the first end wall member, a bottom edge of the first side wall member, a bottom edge of the second end wall member, and a bottom edge of the second side wall member, said channel being interrupted by said first gap and said second gap,

a first support strap at an approximately midpoint of the first side wall member at a spaced distance beneath the top member and within the first gap;

a second support strap at an approximately midpoint of the second side wall member at a spaced distance beneath the top member and within the second gap;

a securing strap having first and second ends and running through the channel, said securing strap supported by the first and second support straps as it passes through the first and second gaps, wherein each of the first and second support straps provide no more than one point of contact between the securing strap and the first and second support straps on respective sides

of the module, thereby optimizing relocation of forces on the cover to enhance the cover's ability to withstand peak wind conditions; and

a fastening mechanism securing the first and second ends of the securing strap.

2. The cover for a module of fibrous material as set forth in Claim 1, wherein said first and second support straps each comprise a piece of elongated fabric folded to form a loop and secured to the cover and wherein said securing strap passes through said loop.

3. The cover for a module of fibrous material as set forth in Claim 1, wherein said first and second support straps each comprise a piece of elongated fabric folded to form a loop and secured to the cover and a ring secured within said loop and wherein the securing strap passes through said ring.

4. The cover for a module of fibrous material as set forth in Claim 3, wherein said first and second support straps are each folded to form a diamond shape.

5. The cover for a module of fibrous material as set forth in Claim 1, wherein said first and second side wall members each comprise a pair of generally triangular sections separated by the first and second gaps, respectively.

6. The cover for a module of fibrous material as set forth in Claim 5, wherein each triangular section of the first side wall extends from an opposite corner of the first side wall

toward the first gap and wherein each triangular section of the second side wall extends from an opposite corner of the second side wall toward the second gap.

7. A cover for a module of fibrous material, consisting of:

a top member;

a first side wall member defining a first gap approximately at a midpoint of the first side wall member;

a second side wall member defining a second gap approximately at a midpoint of the second side wall member;

first and second end wall members;

a channel extending around the cover along a bottom edge of the first end wall member, a bottom edge of the first side wall member, a bottom edge of the second end wall member, and a bottom edge of the second side wall member, said channel being interrupted by said first gap and said second gap,

a first support strap at an approximately midpoint of the first side wall member at a spaced distance beneath the top member and within the first gap, said first support strap formed by a piece of elongated fabric folded to form a first diamond-shaped loop and secured to the cover and a first ring secured within the loop;

a second support strap at an approximately midpoint of the second side wall member at a spaced distance beneath the top member and within the second gap, said first and second support straps each comprise a piece of elongated fabric folded to form a second diamond-shaped loop and secured to the cover and a second ring secured within the loop;

a securing strap having first and second ends and running through the channel, said securing strap supported by the first and second rings as it passes through the first and second gaps, wherein each of the first and second support straps provide no more than one point of contact between the securing strap and the first and second support straps on respective sides of the module, thereby optimizing relocation of forces on the cover to enhance the cover's ability to withstand peak wind conditions; and

a fastening mechanism securing the first and second ends of the securing strap.

8. A method of securing a cover to a module of fibrous material having a top, first and second sides and first and second end, comprising the steps of:

placing a cover over the module with said cover encompassing the top of the module and at least a portion of the first and second sides and first and second ends;

threading a securing strap through a channel in the cover and through first and second support straps on the cover located at the approximately midpoint of the first and second sides of the module, wherein each of said first and second support straps provide no more than one point of contact between the securing strap and the first and second support straps on respective sides of the module, thereby optimizing relocation of forces on the cover to enhance the cover's ability to withstand peak wind conditions; and

tightening the securing strap about the module.

9. A cover for a module of fibrous material, consisting of:

a top member;

a first side wall member;

a second side wall member;

first and second end wall members;

a channel extending around the cover along a bottom edge of the first end wall member, a bottom edge of the first side wall member, a bottom edge of the second end wall member, and a bottom edge of the second side wall member;

a first support strap at an approximately midpoint of the first side wall member;

a second support strap at an approximately midpoint of the second side wall member;

a securing strap having first and second ends and running through the channel, said securing strap supported by the first and second support straps, where the first and second support straps provide no more than one point of contact between the securing strap and each of the first and second support straps on their respectively sides of the module, thereby optimizing relocation of forces on the cover to enhance the cover's ability to withstand peak wind conditions.

10. The cover for a module of fibrous material as set forth in Claim 9, wherein said first and second support straps each comprise a piece of elongated fabric folded to form a loop and secured to the cover and wherein said securing strap passes through said loop.

11. The cover for a module of fibrous material as set forth in Claim 9, wherein said first and second support straps each comprise a piece of elongated fabric folded to form a loop and secured to the cover and a ring secured within said loop and wherein the securing strap passes through said ring.

12. The cover for a module of fibrous material as set forth in Claim 11, wherein said first and second support straps are each folded to form a diamond shape.

13. The cover for a module of fibrous material as set forth in Claim 9, wherein said first and second side wall members each comprising a pair of generally triangular sections separated by the first and second gaps, respectively.

14. The cover for a module of fibrous material as set forth in Claim 13, wherein each triangular section of the first side wall extends from an opposite corner of the first side all toward the first gap and wherein each triangular section of the second side wall extends from an opposite corner of the second side wall toward the second gap.

15. The cover for a module of fibrous material as set forth in Claim 1, wherein each of the end wall members extends down from the top member to cover approximately 2/3 of the height of the module.

X. EVIDENCE APPENDIX

The Taubert Declaration that follows was submitted as evidence along with the Response filed on June 13, 2008, which first referenced this attached evidence. In numbered paragraph 6 on page 5 of the Office Action of August 8, 2008, the examiner addressed this evidence, and then once again addressed this evidence in numbered paragraph 5 on page 4 of the Final Office Action dated December 17, 2008. The Daniel Declaration that follows was submitted as evidence along with the Response filed December 13, 2007, which first referenced this attached evidence. In number paragraph 5 on page 4 of the Final Office Action of February 14, 2008, the examiner addressed this evidence. Applicants now respectfully request that the Board review and consider this evidence of non-obviousness anew in conjunction with the arguments set forth above.

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicants: Bart Daniel	§	
	§	Group Art Unit: 3781
Serial No.: 10/758,459	§	
	§	Examiner: MAI, Tri M
Filing Date: January 15, 2004	§	
	§	Confirmation No.: 5873
For: COVER FOR MODULES OF FIBROUS MATERIAL	§	

Mail Stop Amendment
Commissioner For Patents
P. O. Box 1450
Alexandria VA 22313-1450

DECLARATION UNDER 37 CFR §1.132

I, Kyle Gene Taubert, do hereby declare that:

1. I have 16 years experience in the cotton ginning industry, including 19 years experience relating to cotton modules and the use of covers for cotton modules;

2. During that period, I have served as General Manager for Oasis Gin & Warehouse, Inc., Seminole, TX from February 2000 to present, Manager for Coastal Bend CO-OP Gin, Corpus Christi, TX from April 1997 through January 2000, as Gin Superintendent for Ocho Gin, Seminole, TX, from September 1994 to April 1997, and as Research Technician for Texas Agricultural Experiment Station, Texas A&M University, College Station, TX, from January 1990 to May 1993.

3. As part of my duties at Oasis Gin, Inc., I have been involved in purchasing and using covers for use on cotton modules;

4. Education and additional qualifications:
   B.S. Degree, Agricultural Engineering, Texas A&M University, 1994

Certified Ginner, National Cotton Ginners' Association, 1996
Instructor, USDA Cotton Gin School, Lubbock, TX, 1998, 1999, 2001

5. In my current capacity, I have become familiar with International Fiber Packaging (a division of Leggett & Platt) Company's Cover for Modules of Fibrous Material, as set forth in pending application 10/758,459 which is the subject of this declaration;

6. The company I work for, Oasis Gin, Inc., has been using International Fiber Packaging Company's ("IFPCO") cover for 4 years;

7. I am also familiar with a competitive cover product by Kenny Porter/L.P. Brown Co., since in the past Oasis Gin, Inc. also used the Porter/L.P. Brown Co. cover product, as set forth in Figs. 16 and 19 of U.S. Patent No. 5,904,243, for 3+ years, but has discontinued use of the Porter/L.P. Brown Co. product due to the superior performance provided by IFPC's cover;

8. Prior to the introduction of IFPCO's cover, Oasis Gin, Inc. had been using Kenny Porter/L.P. Brown Co. covers for several years, but long sought a better cover solution for cotton modules since Kenny Porter/L.P. Brown Co covers had a tendency to come off in high wind conditions;

9. The IFPCO cover uses a single support strap at or near the center of each side wall of the cover to hold the cover in place on cotton modules, resisting wind forces;

10. The Kenny Porter/L.P. Brown Co cover is similar to the IFPCO cover, but uses multiple support straps offset from the center to hold the cover in place on cotton modules;

11. In my current position with Oasis Gin, Inc., I have been a customer of both cover products, and so I am extremely familiar with these products;

12. In my current position with Oasis Gin, Inc., I have used approximately 1,000 of Kenny Porter/L.P. Brown Co. covers over 3+ years, and I have used approximately 1,700

IFPCO covers over 4 years, so I feel fully qualified to compare these products as an industry expert who is well versed in their performance;

13. In my experience using both the IFPCO and Kenny Porter/L.P. Brown Co. covers in similar conditions over several years, the IFPCO covers are surprisingly superior at staying in place on the cotton modules, and the level of superiority is so significant that it has caused me to stop using the Kenny Porter/L.P. Brown Co. covers in favor of the covers from IFPCO;

14. By way of example, during the harvest season of 2004 and 2005 we experienced several unusually high wind events in west Texas. 40 mph sustained winds were not uncommon. Approximately 40% of my LPB covers were lost and never recovered. During the 2005 harvest, frustrated, I tried the IFPCO cover offering. None of the IFPCO covers were lost in 2005, and none have been lost since.

15. So in my extensive usage of these products under similar conditions in the field, I found that IFPCO covers are significantly superior to Kenny Porter/L.P. Brown Co. covers in resisting wind forces and staying in place on cotton modules;

16. Accordingly, I have stopped buying or using Kenny Porter/L.P. Brown Co. covers, and now exclusively use IFPCO covers;

17. In my extensive experience comparing these two products, IFPCO covers perform significantly better in real-world conditions;

18. I have spoken informally with others in my industry, and their experiences with these products are similar to my own, described above;

19. I was initially surprised to find that IFPCO covers provide superior performance, since I would have expected the additional straps of the Kenny Porter/L.P. Brown Co. cover to provide added strength, but I have been won over by the real-world results seen in the field;

20. In my expert opinion, based on extensive usage of both products in the field, IFPCO's cover is surprisingly superior to Kenny Porter/L.P. Brown Co. cover; and

21. The superior results of the IFPCO covers are primarily why I use IFPCO covers instead of Kenny Porter/L.P. Brown Co. covers, so the performance difference has led to commercial success of the IFPCO cover with Oasis Gin, Inc.

I further declare that all statements made herein of my own knowledge are true and that all statements made herein on information and belief are believed to be true; and further that these statements were made with the knowledge that willful false statements and the like so made are punishable by fine or imprisonment, or both, under Section 1001 of Title 18 of the United States Code and that any such willful false statements may jeopardize the validity of the application or any patent issuing thereon.

Further Declarant sayeth not.

Date: June 5, 2008

By: _____

Printed Name: Kyle Gene Taubert

Title: General Manager

Company: Oasis Gin & Warehouse Co., Inc.

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Application of: Thomas Lummis	Group No.: 3781
Serial No.: 10/758,459	Atty. Docket No.: 40661-031
Filed: 01/15/2004	
For: Cover for Modules of Fibrous Material	Examiner: Mai, Tri M.

MAIL STOP Amendment
Commissioner of Patents
P.O. Box 1450
Alexandria, VA 22313-1450

DECLARATION UNDER 37 C.F.R. SECTION 1.132

HONORABLE SIR:

I, Barton W. Daniel, declare and say as follows:

1. I am a citizen of the United States and reside at 3855 Princeton Oaks, Kennesaw, Georgia.

2. I am a co-inventor of the above-identified application and, therefore, I am completely familiar with the contents of the patent application and also with the disclosure contained in U.S. Patent No. 5,904,243 issued to Porter (hereinafter, "Porter '243"), cited in the Office action of August 13, 2007, in connection with the above-identified patent application and wherein the certain claims therein were rejected over the disclosure of this reference.

3. I have an Agricultural Engineering degree (1983) from Texas A&M University. I worked as a design engineer, field engineer, and in sales for Lummus Industries from 1984-1992.

From 1992 to 1996 I worked in manufacturing for the Karastan division of Mohawk Industries. From 1996 to the present, I have been in sales, and performing engineering design for International Fiber Packaging where I currently hold the title of President.

4. From my direct experience over the course of my career that there has existed a long-felt and unresolved need in the market for module covers capable of withstanding strong gusts of wind. Given the fact that module covers are exposed to significant fluctuations in wind levels, many module covers are blown off modules or are blown into a position where the cover no longer protects the module. Given that the cost of module covers reduces profit, and that unprotected modules get wet and cannot be taken to the cotton gin, there has been a strong desire to have module covers that would not be blown off or blown out of adjustment because of strong gusts. Other people have tried without success to design module covers to provide a greater resistance to peak wind conditions.

5. In my view and based upon my experience, the results realized from the claimed configuration were unexpected and significant. Under my direction and control, we first began substantial empirical testing of the commercial embodiment of the claimed invention in Lubbock, Texas in 2003, as side-by-side comparisons to the Porter products on the market have been performed. Such empirical testing has shown that the claimed configuration (having no more than one point of contact between the securing strap and the support straps on respective sides) is able to withstand significantly higher peak wind conditions than other tested designs. Accordingly, I conclude that the claimed configuration that provides no more than one point of contact between the securing strap and the support straps on respective sides produces a greater resistance to the cover's being displaced by wind, which is unexpected and significant.

6. It is my understanding that there has been skepticism of experts. As Porter '243 suggests, it has been preferred to provide the support straps with multiple hanger means to support the securing strap. *See* Porter '243, Col. 7, Lines 13-18. It is my understanding that it has been assumed that the best and most reasonable design approach for securing covers is to have multiple hangers and thus multiple points of support in order to distribute resulting forces.

7. The claimed invention reads on the commercial embodiment of the claimed invention. There has been significant commercial success of the commercial embodiment of the claimed invention. In fact, the commercial embodiment of the claimed invention now represents more than 33% of our company's sales of four module covers types. Based upon my experience, this commercial success is a direct result of its greater resistance to being displaced by strong gusts – the cover stays on the module better.

8. I believe that the structural benefits of the design stem primarily from the concentration of vertical force along a single path, such as that created by the single point of contact between the securing strap and the support straps on respective sides of the cover. When a module cover counters the ripples of force created by the wind, the cover resists displacement due to vertical securing forces that result from friction between the horizontal support strap and the module. It is my observation that, during peak wind conditions, a concentration of the available securing force along a single path is more effective at resisting displacement caused by wind than distributing the available vertical force and reducing the likelihood of the cover's being blown off or damaged.

9. It is my best understanding that cargo nets, as disclosed in Frieder 3,011,820, are totally unrelated to module covers as claimed in the present invention in all aspects. Cargo nets and

module covers are used in totally different fields of application. Cargo nets are to transfer cargo, equipment, and the like, or to hold items down. They do not cover items or protect them from rain and the like. Moreover, cargo nets and module covers are totally different in their structures. Cargo nets which are mesh do not protect against rain and are generally unaffected by wind. Module covers are solid, protect against rain, and are highly affected by wind. The very properties associated with cargo nets are exactly opposite the properties that are required by module covers.

10. I further declare that all statements made herein of my own knowledge are true and that all statements made on information and belief are believed to be true; and further that these statements were made with the knowledge that willful false statements and the like so made are punishable by fine or imprisonment, or both, under Section 1001 of the Title 18 of the United States Code, and that such willful false statements may jeopardize the validity of the above-referenced application or any patent issuing thereon.

12/7/2007
Date

Barton W. Daniel

XI. RELATED PROCEEDINGS APPENDIX

None.